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MEMORANDUM

TO: Haines Borough Assembly

CC: Bill Seward, Borough Manager

FROM: Patrick W. Manson
Boyd, Chandler & Falconer, LLP
Borough Attorney 

RE: Appeal Re Tourism Advisory Board meeting, November 10, 2016

DATE: December 12, 2016

Our office was asked to provide a legal opinion regarding a citizen appeal of certain actions by the Tourism Advisory Board (TAB). At its November 10, 2016 meeting, the Board developed recommendations to the Borough Assembly regarding proposed Ordinance 16-10-445, which would alter eligibility requirements for two seats on the Heliski Map Advisory Committee. The appeal states that two TAB members have significant financial interests in the proposed ordinance that should have precluded them from voting on several Board motions regarding the ordinance.

We have analyzed the appeal and reached the following conclusions:

1. The recommendations of the TAB to the Assembly regarding O-16-10-445 are appealable under HBC 2.60.130.
2. We do not believe Mr. Gaffney and Mr. Sundberg's votes violated HBC 2.06 or 2.62 because neither individual has a significant financial interest in O-16-10-445.
3. We recommend the Assembly deny this appeal.

The reasons for these conclusions are set forth in greater detail below.

BACKGROUND

The factual basis for the appeal is as follows:

It is my contention that the Board Chair erred when he allowed members of the board who have a substantial financial interest to vote on matters pertaining to the composition of the heli-ski map amendment committee....During the assembly meeting of November 8, 2016, the assembly voted unanimously to send Ordinance 16-10-445 to the TAB for revision.

TAB Chair Sean Gaffney is a 74% owner of Alaska Mountain Guides and holds a commercial heli-ski tour permit issued by the borough. Co-chair Scott Sundberg is also a commercial heli-ski tour permit holder and is a 42.39% owner of Southeast Alaska Backcountry Adventures. Even though both of these TAB members have a substantial financial interest in heli-ski issues, at the November 10, 2016, TAB meeting they deliberated and voted on revisions to Ordinance 16-10-445 which would amend the makeup of the heli-ski map amendment committee.¹

The appeal references HBC 2.62.040 which states “no assembly member or member of any committee, board, or commission may vote on any question on which the member has a substantial financial interest.” Because the appellant believes Mr. Sundberg and Mr. Gaffney violated this provision by voting on TAB motions providing recommendations to the assembly regarding the composition of the Heli-ski Map Committee, he requests “that any TAB actions pertaining to a change in the makeup of the heli-ski map committee that occurred in violation of Haines Borough Code will be disregarded by the manager and assembly.”

ANALYSIS

I. The Board’s actions with regard to O-16-10-445 are appealable.

The complaint is styled as an appeal under HBC 2.60.130, which provides as follows:

2.60.130 Appeal. An action or decision of a committee, board or commission may be appealed to the assembly within 10 days by filing with the manager a written notice of appeal expressly setting forth the grounds of the appeal unless otherwise provided for by the code. The mayor shall place the appeal on the next assembly

¹ Ordinance 16-10-445 would preclude residents who are “affiliated with” an environmental or heliski industry group or permit holder from serving in the two seats reserved for “random residents” on the Heliski Map Committee.

meeting agenda and the assembly may continue the appeal hearing up to 30 days. After a hearing on the record, the assembly may, in whole or part, affirm, modify or deny the appeal. (emphasis added)

This section does not provide citizens a right to appeal individual rulings by the chair of a committee, but does allow for appeals of board “actions.” Therefore, this appeal should be treated as one seeking to void the board’s actions and recommendations with regard to O-16-10-445 due to the participation of members who are alleged to have a substantial financial interest in that ordinance. The appealed TAB actions occurred on November 10. The appeal was filed November 14. Therefore, the appeal is timely, and was properly placed on the next assembly meeting agenda (November 29). That meeting was subsequently cancelled due to inclement weather, so this appeal will be heard December 13. The assembly may hear the appeal at that meeting or may continue it for up to 30 days after November 29.

The procedures for the “appeal hearing” should be flexible. This proceeding is quasi-judicial, so the hearing is intended to serve a fact finding and adjudication function. The appellant may be provided an opportunity to present additional evidence or argument if the assembly wishes. The committee members whose actions are being challenged should be provided an opportunity to respond to the allegations identified in the appeal if they wish (and any in-person presentation by the appellant). Comments from the public should not be accepted or considered because this is a quasi-judicial proceeding. The assembly may decide by motion whether to affirm, modify, or deny the appeal in part or in its entirety.

II. Mr. Gaffney and Mr. Sundberg did not violate HBC 2.62.040(A) or HBC 2.06.030 (C) when they voted on motions relating to O-16-10-445.

We have reviewed the appeal, the draft of O-16-10-445, and the minutes of the November 10 TAB meeting in order to render this opinion. Based on the information presented to us, we do not believe Mr. Gaffney and Mr. Sundberg had a substantial financial interest in the proposed ordinance. We therefore do not believe the appeal has merit.

The appeal focuses exclusively on whether Mr. Gaffney and/or Mr. Sundberg have a “substantial financial interest” in the actions of the Heli-Ski Map Committee.² HBC 2.62.040(A) states: “No assembly member or the member of any committee, board or commission may vote

² HBC 2.06.030(C) is similar: “An assembly member or member of any board or commission may not deliberate or vote on any matter in which the member has a substantial personal or financial interest.” Mr. Holle mentions this section in passing but never argues that the ordinance affects a “personal interest”. Since this argument was not made, we do not address it.

on any question on which the member has a substantial financial interest.”³ This provision applies to the Tourism Advisory Board. The question is therefore whether the votes cast by Mr. Gaffney and Mr. Sundberg involved a “question on which the member[s] have] a substantial financial interest.”

A. Applicable law

We assume for the purposes of this opinion that the appellant’s assertions as to each TAB member’s ownership interest in the heli-ski companies are accurate. However, ownership in a heli-ski company does not categorically constitute a “significant financial interest” in every proposed ordinance or action that could impact the heli-ski industry in Haines. Nor does such ownership automatically disqualify the individuals from participating in all governmental decisions which may affect the heli-ski industry. On the contrary, the Alaska Supreme Court has recognized that industry members bring valuable and necessary expertise to boards and committees dealing with that industry.⁴ However, the Court also recognized that in some cases board members may have a “narrow and specific interest” in certain matters that come before them.⁵ Where a board member has a “peculiarly personal” interest in a specific matter, the member may be required to abstain from voting on the matter.

Borough Code incorporates this concept in HBC 2.06.020(B)(1): “There is no violation of this code of ethics if, as to a specific matter, a public officer’s...[p]ersonal or financial interest in

³ “‘Financial interest’ means any interest, other than securities traded on a national exchange, held by an officer or an immediate family member, including involvement or ownership of an interest in a business, property, or a professional or private relationship, from which the person has received or expects to receive compensation.” HBC 2.06.990.

⁴ See *Carney v. Board of Fisheries*, 785 P.2d 544, 548 (Alaska 1990) (quoting *Consumers Union of United States v. California Milk Producers Advisory Bd.*, 82 Cal. App. 3d 433 (1978)) (citing California law):

Merely because a board member derives income from within a given industry, he or she does not lose the ability to be objective. Nor does that person lose the capacity to make decisions beneficial to the public's interest. The public interest emerges from the competing interests of various groups in our society, including those from a given industry. The Act does not disallow that board member, who has a knowledge and a comprehension of how the industry interacts with society, from participating in governmental decisions which affect that industry.

⁵ *Carney*, 785 P.2d at 548.

the matter is...of a type that is possessed generally by the public or a large class of persons to which the public officer belongs....” This analysis is case-specific and heavily fact-dependent. “[T]he focus...[is] on the relationship between the public official’s financial interest and the possible result of the official’s action, regardless of the official’s intent.”⁶

HBC 2.06.020(B)(2) likewise focuses on this causal relationship, stating that there is no ethics violation if a public officer’s “[a]ction or influence would have an insignificant or conjectural effect on the matter...” This ordinance requires at least a reasonably foreseeable relationship between the official action and the member’s financial interests in order to find a violation of the ethics code. The impact of a particular action or vote on a member’s financial interests need not be certain or definite, but it must be reasonably likely, not conjectural, and also “significant,” “substantial and material”. HBC 2.06.020(A)(3) and (B)(1).

In summary, to determine whether the two heli-ski operators on the Board have a substantial financial interest in the two TAB motions, the assembly must decide whether (1) each motion has more than a conjectural effect on the financial or personal interests of the member; (2) the interest likely to be affected by the motion is specific to the individual committee member and not “possessed generally by the public or a large class of persons to which the public officer belongs,” and (3) that impact on the interest is reasonably likely to be significant, substantial, and material.

B. The TAB’s recommendations do not have more than a conjectural effect on Mr. Sundberg and Mr. Gaffney’s financial interests.

Here, the matter before the Tourism Advisory Board was a proposed ordinance which would amend HBC 5.18.080(I) to prohibit residents who are “affiliated with an environmental or heliski industry group or permit holder” from serving in the two Heliski Map Committee seats reserved for “random” residents. In short, the ordinance could—at most—prevent certain people (including the two TAB members named in this complaint) from filling two seats on a different committee with no legislative, rule-making, or enforcement authority. One other seat would remain available for industry representatives, including the two TAB members. The TAB further recommended two minor changes to the structure of the Committee: that the Assembly add representatives from the TAB and the Parks and Recreation Committee to the Heliski Map Committee, and that the existing heli-ski industry and environmental seats on the Map Committee be converted to advisory, non-voting seats.

⁶ *Griswold v. City of Homer*, 925 P.2d 1015, 1026 (Alaska 1996) (citing *Carney*, 785 P.2d at 548).

There is simply no way to conclude that the two TAB members have a significant financial interest in these proposed changes. None of these proposed changes directly affect the ultimate decision with regard to the Heli-ski Map. Rather, they affect the composition of an advisory group that is involved in the process for developing the map, which in turn may have an effect on the two TAB member's finances (though no proof has been offered of such an impact).

It is impossible to determine with any reasonable degree of certainty what impact recommending changes in the composition or structure of the Committee will have on an individual heli-ski company. The impacts on Mr. Gaffney and Mr. Sundburg's financial interests from such changes are therefore entirely conjectural.

To illustrate this, consider the causal links that would have to be proven or accepted in order to conclude that Mr. Gaffney and Mr. Sundberg's participation in the meeting is reasonably likely to impact each of them financially. In order to reach that conclusion, the appellant would have to prove that (1) the TAB recommendations will be accepted by the Assembly; (2) the Assembly will pass O-16-10-445; (3) the change in eligibility requirements will result in a different composition of the Map Committee than would have occurred absent the new eligibility requirements; (4) the differently-composed committee will produce different recommendations than would have been generated otherwise; (5) the committee's recommendations will alter the Assembly's final decision as to the areas available for heli-skiing, and (6) the areas the Assembly elects to open or close will substantially impact the financial interests of Mr. Gaffney and Mr. Sundberg.

Not only does the appeal fail to prove any of these causal links, most of these links are essentially impossible to prove because they are, by their very nature, conjectural. Without *any* reasonably plausible, identifiable link between changing the eligibility requirements and the TAB members' financial interests, it is impossible to conclude that Mr. Gaffney and Mr. Sundberg have a substantial financial interest in the TAB's recommendations with regard to O-16-10-445.

The appeal does not contain any information to suggest that Mr. Gaffney's and Mr. Sundberg's votes were reasonably likely to have a "significant," "substantial and material" impact on either member's financial interests. Rather, the appeal simply assumes that any matter relating to the Heli-ski Map Committee (and heli-skiing in general) will have a substantial financial impact on anyone with an ownership interest in a heli-ski company. While there may be cases where that is true (*i.e.*, where an owner of a heli-ski company would substantially benefit from a borough action), the appellant has not provided any information supporting that conclusion for this particular committee action. The TAB reviewed an ordinance that would restrict who is eligible to serve on two seats on the Heli-ski Map Committee, and recommended two relatively minor structural changes to the committee. There is no evidence of whether and

how such a change will impact the financial interests of any heli-ski company, much less the two identified in this appeal.

We therefore conclude that Mr. Gaffney and Mr. Sundberg do not have a significant financial interest in the votes regarding O-16-10-445 or the other motions recommending changes in the composition of the Heli-ski Map Committee. They were therefore not required to recuse themselves from voting.⁷ We therefore recommend this appeal be denied.

⁷ Even if we concluded that the two members should not have voted on the motions regarding O-16-10-445, the appellant might still not be entitled to the relief he requests because, under Alaska law, a legislative action can be upheld despite the participation of members who should have been disqualified. *See Griswold*, 925 P.2d at 1029. In light of our conclusion that this appeal is without merit, we provide no opinion on that issue.